Supreme Court, U.S.
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No. 03-566

IN THE

Supreme Court of the United States

CROWN CORK & SEAL COMPANY (DELAWARE), INC.,

Petitioner,

v.

COMPTROLLER OF THE TREASURY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF IN RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

REPLY BRIEF IN RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Crown Cork & Seal Company (Delaware), Inc. ("Crown") files this reply brief pursuant to Rule 15(6) of the Rules of the Supreme Court of the United States.

I. Counsel for Respondent improperly suggest that the Commerce Clause and Due Process Clause issues raised by Crown are less relevant than asserted by Crown in this matter because Crown did not conduct significant business operations in Delaware.

Through their brief, counsel for Respondent assert that the Commerce Clause and Due Process Clause issues raised by Crown in this matter are less relevant than asserted by Crown because the Court of Appeals of Maryland ("Court of Appeals") determined that Crown did not conduct significant business operations and thus lacked economic substance in Delaware. (Brief in Opposition to Petition for a Writ of Certiorari ("Brief in Opp.") at 1-3 and 6.) The focus of the Commerce Clause and Due Process Clause is whether a corporation conducts sufficient business operations in the taxing state to render the corporation subject to tax. Thus, the issue of whether Crown's business operations in Delaware were substantial is irrelevant to the issue of whether Maryland may constitutionally impose its corporate income tax ("Tax") on Crown.

As an initial matter, it should be noted that through its opinion, the Maryland Tax Court, as the fact-finding tribunal with respect to this matter, determined that Crown had economic and business substance in Delaware:

> "[Crown] is not a phantom or sham corporation. [Crown] is a viable entity established for valid business purposes, including the protection of valuable intellectual property rights from hostile

> takeovers of the parent corporation. [Crown] maintained an office in Delaware, met all corporate formalities, had separate bank accounts and employees performing services pursuant to written employment agreements. In addition, [Crown] received royalty income from third parties (other than Crown Parent or an affiliate) during some of the years in controversy." (Appendix to the Petition for a Writ of Certiorari ("App.") at 74a.)

Despite the factual determinations of the Maryland Tax Court with respect to the significance of Crown's business operations in Delaware and the deference to which those findings were entitled, the Court of Appeals found that Crown conducted relatively insignificant business operations in Delaware and concluded that Crown lacked economic substance in Delaware. (App. at 23a-26a and 38a.) Nonetheless, the Court of Appeals was careful not to conclude that the existence of Crown should be disregarded or to suggest that Crown was not a viable business corporation. Rather, the Court of Appeals sustained the assessment of Tax by the Comptroller of the Treasury ("Comptroller") against Crown based on its conclusion that Crown had relatively insignificant business operations in Delaware and that Crown had an affiliate that conducted business operations in Maryland. (App. at 2a-44a.) The Court of Appeals reached its conclusion in that manner because Crown could not have been required to file Tax returns and pay Tax if Crown were not a viable business corporation or had Crown's existence been wholly disregarded. Thus, the emphasis by counsel for Respondent on the conclusion that Crown conducted insignificant business operations in Delaware should be disregarded in determining the Commerce Clause and Due Process Clause issues in this matter. The appropriate issue in this matter is whether Maryland may constitutionally impose Tax on Crown based solely on the fact that an affiliate of Crown conducted its business in Maryland.

Even assuming *arguendo* that: (1) Crown was devoid of business or economic substance; (2) Crown could be properly disregarded as a separate business entity; and (3) a disregarded non-entity could be required to file Tax returns and pay Tax, Maryland still has to establish that there were requisite contacts between Crown, the disregarded non-entity, and the State of Maryland to justify the imposition of Tax under the Commerce Clause and Due Process Clause. Whether an out-of-state entity has substantial, insubstantial or nonexistent business substance outside of a taxing jurisdiction has no bearing on whether that entity has nexus with that taxing jurisdiction. Those determinations are separate inquiries that should not be blurred.

II. Counsel for Respondent improperly assert that this appeal presents an "identical legal issue" with respect to which this Court has previously denied certiorari.

Through their brief, counsel for Respondent assert that this Court should not grant a writ of certiorari because this Court denied a petition for a writ of certiorari in 1993 that "presented the identical legal issue." (Brief in Opp. at 5 referring to *Geoffrey, Inc. v. South Carolina Tax Commission*, 313 S.C. 15, 18 (1993), *cert. denied*, 510 U.S. 992 (1993).) In *Geoffrey*, South Carolina did not challenge the economic or business substance of the out-of-state entity, did not attempt to establish nexus based on the fact that an affiliated entity conducted business in South Carolina and did not require the out-of-state entity to apportion its income using the separate-company apportionment factors of the in-state affiliated entity. *Geoffrey*, 313 S.C. 15. Instead, South Carolina predicated nexus on the basis that intangible assets of the out-of-state entity were physically present in South Carolina. *Id.* at 18. In this appeal, the Comptroller has never attempted to justify its assessment against Crown on the basis that Crown's intangible assets are physically present in Maryland. Rather, the Comptroller has consistently taken the view that Maryland has nexus to impose Tax on Crown

because: (1) Crown does not conduct significant business operations and lacks economic substance in Delaware; and (2) Crown's corporate parent, Crown Cork and Seal Company, Inc. ("Parent"), conducts business in Maryland. (App. at 36a-43a and 115a-121a.) Although Maryland and South Carolina both attempted to impose a state corporation income tax with respect to an out-of-state entity, their legal theories for doing so are distinct and thus, are not "identical."

III. Counsel for Respondent improperly assert that the legal issue raised in this appeal has previously been resolved by this Court.

Through their brief, counsel for Respondent improperly assert that the issue in this appeal was resolved by this Court through its decision in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987). (Brief in Opp. at 7-8.) In *Tyler Pipe*, this Court concluded that an out-of-state taxpayer was subject to the Washington business and occupation tax because independent sales representatives of Tyler Pipe were physically present in Washington, were controlled and directed by Tyler Pipe, conducted the business of Tyler Pipe in Washington and thus, established and maintained an economic market for Tyler Pipe in Washington. *Tyler Pipe*, 483 U.S. at 250-51. Counsel for Respondent improperly conclude that the independent sales representatives in *Tyler Pipe* are analogous to Parent in this appeal. That conclusion is without merit. The only similarity is that Parent was physically present in Maryland. Unlike the sales representatives in *Tyler Pipe*, Parent was not subject to the direction and control of Crown. Moreover, Parent did *not* solicit licenses of Crown's intellectual property on behalf of Crown in Maryland and thus, did not conduct Crown's business nor establish an economic market in Maryland for Crown. Parent merely conducted its own business (i.e. manufacturing and distribution of metal cans, crowns and closures for bottles, can filing machines and

plastic bottles and containers) in Maryland.[1] Thus, the reliance on *Tyler Pipe* by counsel for Respondent in support of their argument with respect to this appeal is misplaced.

CONCLUSION

For the reasons stated in this reply brief, Crown respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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1. As part of its manufacturing and distribution operations, Parent compensated Crown on an arm's-length basis for the use of Crown's intellectual property. Thus, Crown earned income when Parent employed Crown's intellectual property in the manufacture and subsequent sale of Parent's product. That type of arm's-length transaction cannot be a basis for taxing jurisdiction or states would have unlimited reach to impose tax on out-of-state entities. For example, the sale of an automobile by a car dealer would justify the imposition of tax with respect to any corporation that provided a component part of that automobile. Thus, manufacturers of tires or leather upholstery could be subject to tax as they would economically benefit every time a car was sold.